NO. 1371

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

HERBERT STRAIN, Appellant,

vs.

H. B. PALMER, Receiver; BENJAMIN GRAHAM, Trustee; THE AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, ENGLAND, LIMITED; H. H. NELSON SHEEP COMPANY, H. H. NELSON AND JAMES T. STANFORD,

Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MONTANA.

APPELLANT'S BRIEF.

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I.

ABSTRACT OF THE CASE.

This is an appeal from a final order and decree denying a Petition pro interesse suo agd dismissing the proceeding by way of the Petition.

The facts are these: On March 20, 1901, Appellee Nelson Sheep Company made to Appellee Graham, as Trustee for Appellee The American Freehold Land Mortgage Company, as beneficiary, its mortgage to secure payment of thirty thousand dollars to the beneficiary. The mortgage embraced only lands and appurtenances (Record 16, 17, 22). One of its provisions is this: "If the said grantor * fail to comply with any of the conditions of this in-

denture, then all of said debt secured hereby shall, at the option of the trustee * become due and collectible and all rents and profits of said property shall then immediately accrue to the benefit of said party of the third part (beneficiary), and the occupants of said property shall pay rent to the trustee * . And upon such failure * the grantor * does fully empower said trustee, * to collect and sue for any rents due, or to become due on sail premises, and without process of law to enter upon and take possession of * and sell the property hereinafter conveyed * ." (Rec. 23, 24). The trustee and beneficiary filed their bill of foreclosure on April 11, 1904, and on April 28 the Sheep Co. and Nelson, and on May 3d defendant Stanford, admitted service of the subpoena (Rec. 33). Meanwhile, on April 16, an ex parte order was made restraining the Sheep Company from selling or disposing of "any of the property described in the trust deed or mortgage made a part of the bill of complaint in this suit, and recorded in the office of the Clerk and Recorder of Cascade County, Montana, in Book 18 of Mortgages, page 249, until the further order of the Court herein," and requiring defendants to show cause on May 17 "why a receiver of the property described in said trust deed, and the rents, issues and profits thereof, should not be appointed as prayed for" in the bill. Defendants admitted service of this order on the day it was made (Rec. 34, 35). On September 3, 1904, defendants Sheep Company and Nelson filed their consent to the appointment of a receiver, they "being in the possession of the property de-

scribed in the trust deed or mortgage made a part of the bill of complaint * , hereby consent to the granting of the prayer of said bill * for the appointment of a receiver to take possession, manage, operate and hold said property during the pendency of this suit, and to receive and collect the rents, issues and profits thereof * ." (Rec. 35, 36). This consent was signed April 18, 1904, (Rec. 36); but, owing to the circumstances over which complainants had no control, it was not filed or acted upon until September 3 (Rec. 65). On that day the court appointed Palmer receiver, "it appearing that the property described in the trust deed or mortgage * is in the possession of the defendant H. H. Nelson Sheep Company. * It is * decreed that H. B. Palmer * is hereby appointed receiver of all and singular the said property described in said trust deed or mortgage, together with the income, issues and profits thereof. And * defendant sheep company * are hereby restrained, * during the pendency of this suit, from interfering with, transferring, selling or disposing of any of said property, or from taking possession thereof * ." (Rec. 37, 38).

On October 24, 1904, Herbert Strain, now appellant, duly filed a petition pro interesse suo, serving it upon the solicitor representing both the receiver and the complainants (Rec. 45, 51, 68, 74). An order was made requiring an answer or response to be made to the petition (Rec. 51), and an agreed statement of facts was filed (Rec. 59) showing, in addition to the matters disclosed by the foregoing, that Strain was, and had been, a merchant, trad-

ing as Strain Brothers, and had actual notice before August 17, 1904, of the fact that a foreclosure suit had been commenced, but had neither notice nor knowledge of the restraining order or order to show cause of April 14, or that complainants had prayed for such orders; that he first acquired such notice or knowledge after August 17, that if he was chargeable with constructive notice it is by reason only of the doctrine of lis pendens; that he had no actual notice or knowledge that the mortgage purported (if it did purport) to cover, or impose a lien upon, rents, issues and profits; that he had no kind or sort of notice of the consent to the appointment of a receiver (Rec. 65); that the mortgage was not accompanied by the affidavit required by Sections 3849 and 3861 of the Civil Code of Montana, or any affidavit whatever; that the Sheep Company, mortgagor, remained in the actual and exclusive possession, custody and control of all said real property from March 20, 1901, to September 4, 1904, when the receiver entered into possession thereof; that the hay and oats, sold to Srtain on August 17, as will hereinafter appear, were grown upon the lands, but were never at any time delivered to or in the possession of complainants or either of them, but remained at all times in the actual possession of the mortgagor Sheep Company until August 17, 1904, when the sale to Strain was made (Rec. 60, 61, 62); that on that day the hay and oats had ceased to derive nourishment from the soil, were ripe, mature, and ready for the harvest, and a part had been cut down, and all were in the possession of the mort-

gagor Sheep Company; that said company was then indebted to Strain in a sum exceeding the value of said chattels, upon an express contract for the direct payment of the money, to-wit, upon a promise to pay Strain the price of goods and wares theretofore sold and delivered by him to it, which debt was then past due and wholly unpaid, and the payment thereof had not been, and was not at any time, secured either in whole or in part by any mortgage, lien or pledge whatsoever (Rec. 62, 63); that on that day and while the mortgagor was so in exclusive possession, and while Strain was without any knowledge, notice or information, that complainants asserted any lien upon the hay and oats (unless he was charged with constructive notice by reason of the pendency of the suit), Strain bought of the mortgagor, and the mortgagor sold to him, the hay and oats (Rec. 63); that the sale was made in payment and discharge of said antecedent and then existing indebtedness, and was evidenced by the following instrument in writing:

"For value received, the undersigned, H. H. Nelson Sheep Co., a corporation, does hereby sell, assign and transfer to Strain Bros., copartners doing business in Great Falls, Cascade Countyy, Montana, all the grain and also all the hay cut and stacked, and hereafter to be cut and stacked, on all the hay land connected with the Riverdale Stock Farm, near Cascade, in the County of Cascade and State of Montana, being two hundred fifty (250) tons more or less, except such share hay as belonged to Hugh Jones and Fred Nicholson. All of said hay

and grain are this day delivered to said Strain Bros., who will hereafter have entire charge and possession of the same. The hay already cut and stacked is to be measured in the usual way at once, and the balance is to be measured in the usual way as soon as stacked.

Dated this 17th day of August, 1904.

(Signed) H. H. NELSON SHEEP CO.,

By H. H. NELSON, Prest.

President and Manager." (Rec. 47, 63).

That immediately upon the sale the mortgagor delivered the actual possession of the chattels to Strain, who continuously kept and maintained actual possession of them until September 4, on which date the receiver, who had been appointed the day before, without the consent and against the protest of Strain took possession of them and still holds them, or their proceeds, notwithstanding repeated demands by Strain for their surrender to him (Rec. 64.) Some of the hay and oats the receiver had sold for $482.82, and had expended $233.37 for twine, hauling, harvesting and haying. He still had in his possession fifty-one tons of hay and fifteen tons of straw. (Rec. 64).

A decree of foreclosure was entered February 4, 1905, declaring that "the said property (lands described in the mortgage) constitutes a single ranch or farm," and directing that it be sold as one parcel and an entirety (Rec. 40). The master sold the lands and appurtenances to complainant and appellee Graham, trustee, for $39,311.48, which was the exact sum due, including all

interest, costs, attorneys' fees, master's compensation, and even five dollars paid for typewriting the Master's report of sale (Rec. 55, 56). The sale was confirmed, and the proper receipt taken for the purchase price (Rec. 58).

On February 26, 1906, more than a year after the decree of foreclosure, and nearly a year after the sale, Strain's petition pro interesse suo was denied (Rec. 66). The receiver filed his report on April 21, 1906, (Rec. 67), to which Strain interposed objections and asked the Court that, in passing upon the report, it direct the receiver to deliver to Strain the hay and oats, to-wit, 80 tons of hay, worth $560, and 32,800 pounds of oats, worth $328, or the value of both in case he had disposed of them, with interest from September 4, 1904. The particular objection then urged was that complainants, having purchased the real property for the full amount of the debt and all costs and expenses, the mortgage was satisfied, and there could be no possible occasion for recourse to Strain's hay and oats or their proceeds (Rec. 72-3). The objections were overruled and the report approved (Rec. 74). On May 31, 1906, the last order was amended nunc pro tunc as of May 28, by adding a denial of the petition pro interesse suo, and finally decreeing a dismissal of the proceeding by way of said petition (Rec. 76). Within six months thereafter and on August 7 an order was made granting an appeal to Strain (Rec. 76, 79), and the assignment of errors was filed. A bond was given and approved, and citation issued and served (Rec. 78, 85, 87), and a transcript of the record filed in the office

of the Clerk of this Court (Rec. 91).

The ultimate question involved is whether or not appellant is entitled to the hay and oats purchased by him on August 17, 1904, or to the proceeds thereof. The questions upon which the answer to this question depends appear in the following:

II.

SPECIFICATION OF ERRORS RELIED ON.

Comes the appellant and says that in the Order and Decree entered on May 28, 1906, as amended by the order and decree of May 31, 1906, entered nunc pro tunc as of the former day, and in the record of this proceeding, there is manifest error, and he here specifies the errors committed or happening in said proceeding and upon which he relies upon this his appeal from said Order and Decree:

1. The Court erred in its order of February 26, 1906, in denying the petition pro interesse suo, in this, that the petition should have been granted.

2. The said order of February 26 was and is erroneous in that, upon the agreed statement of facts, the petition should have been granted and allowed.

3. The Court erred in overruling, on May 28, 1906, the objections of petitioner to the report and account of the receiver for the reason that said objections should have been sustained.

4. The Court erred in overruling the objections to said report of said receiver in this: It was made to appear, by the record in said proceeding and cause, that

upon the sale of the real property mortgaged, complainants purchased the same for a sum sufficient to cover, and which equalled, their mortgaged indebtedness, and all interest, costs and expenses, so that the said mortgage and decree entered thereon became and were satisfied and discharged in full, without necessity of recourse to the hay and oats which had theretofore, on August 17, 1904, been purchased by appellant, or to the proceeds of said hay and oats, or any thereof.

5. The Court erred in said order of May 28, in approving and allowing said report and account of the receiver because under the petition pro interesse suo, the agreed statement of facts filed July 12, 1905, and the proceedings and record in said cause, the said report and account should have been disapproved and disallowed upon consideration of the objections aforesaid thereto, filed May 5, 1906.

6. The Court erred in overruling the said objections so filed on May 5 to said report and account of said receiver, because the real property mortgaged and sold under the decree of February 4, 1905, was bid in by complainant, Benjamin Graham, trustee, for the sum of $39,311.48, and said sale to him was thereafter confirmed and in all things approved, and purchase price paid, and the oats and hay taken and seized by the receiver, if ever subject to the lien or charge of said mortgage, were thereby released and said lien or charge extinguished, and said hay and oats, or their proceeds in the hands of the receiver, belonged to, and should have been ordered

delivered to, petitioner, who purchased and took possession thereof on August 17, 1904, and continued to be the owner and entitled to possession of the same.

7. The Court erred in making that part of its said order of May 28, directing that the balance remaining in the hands of the receiver, after payment of the claim of his solicitor and counsel, be applied on the compensation allowed to said receiver, for the reason that such balance consisted, and consists, of said hay and oats (or the proceeds thereof) then and now owned by petitioner, who in good faith and for value purchased and took immediate possession of the same on August 17, 1904.

8. The Court erred in that part of said order and decree of May 28, which part of said order and decree was made May 31, nunc pro tunc as of May 28, as follows:

"It is ordered that the order made in this cause May 28, 1906, be amended as follows: It is further ordered, adjudged and decreed that the petition pro interesse suo of Herbert Strain in this suit be, and is hereby, denied and refused, and that the proceeding by way of said petition be, and is hereby, finally dismissed." Because:

(a) Upon the admitted facts shown by the record and proceedings, said petition should have been granted.

(b) The crop of hay and oats purchased by Strain from defendant Sheep Company on August 17, were chattels and not real property.

(c) Said hay and oats so purchased by Strain were not covered by, or subject to, the lien or mortgage made to complainants in 1901.

(d) The service of the subpoena upon defendants in the suit to foreclose said mortgage was not constructive notice of a lis pendens, because the doctrine of constructive notice by the servic of subpoena has no application to suits involving such personal property as is the subject of ordinary commerce.

(e) Appellant was not charged with a constructive notice by service of the subpoena upon the defendants, because Section 634 of the Code of Civil Procedure of Montana prescribes the only method whereby constructive notice of a suit may be given, and such statute applies as a rule of property.

(f) Only the land was mortgaged. The land was in the nature of a pledge. The issues and profits of the land were not pledged, but belonged to the mortgagor in possession, and to its assigns. In this case the mortgagor was actually in the exclusive possession and control at the time when appellant purchased the hay and oats from it. Even where the issues and profits of land are specially pledged as security, the mortgagee is not entitled to them, unless and until he, or a receiver, takes actual possession. There cannot be a pledge without possession.

(g) There could not be, as against an intervening purchaser, a mortgoge made in 1901 on crops for 1904.

(h) If in March, 1901, when said mortgage was made, the crops of 1904 could have been mortgaged as against a subsequent purchaser without notice, the only instrument by which they could have been mortgaged was a

chattel mortgage executed and authenticated as required by Sections 3849-3861 of the Civil Code of Montana. It is expressly stated in the record that no chattel mortgage was ever made.

(i) Appellant was a purchaser of the hay and oats, in good faith and for value.

(j) Appellant purchased, in good faith and for value, the oats and hay, and took actual possession thereof on August 17, 1904; and while he was so the owner and in actual possession, the Court below, on September 3, appointed said receiver, and said receiver thereafter, and while appellant was so the owner and in possession of said chattels, wrongfully and unlawfully took them from the appellant's possession and refused to surrender the same to him.

(k) The mortgage of March 20, 1901, did not purport to embrace any crops thereafter to be planted or grown on the real property subject to the mortgage. The provision in the mortgage that "if the grantor fails to pay any or either of said notes at maturity, or for thirty days thereafter, then all of said debt shall, at the option of the trustee, become due and collectible, and all rents and profits of said property shall then immediately accrue to the benefit of said party of the third part, and the occupants of said property shall pay rent to the trustee," did not and could not cover crops without a potential existence, nor does the mortgage even attempt to create a lien thereon. And under the provision aforesaid the mortgagor was obligated to pay rent from the

time the option was exercised, and the provision did not require the mortgagor to pay rent for the use of the premises and at the same time surrender the crops which he had cultivated and raised; nor did appellants exercise the option granted.

III.

BRIEF OF THE ARGUMENT.

In March, 1901, the Sheep Company made its mortgage upon land only, to secure a debt. This mortgage was not accompanied by any affidavit whatsoever. In April, 1904, a bill was filed to foreclose the mortgage, and admission of service was made by the defendants in that suit. On April 16, an order was made, without notice and ex parte, restraining the Sheep Company from selling any of the property described in the mortgage, and requiring them to show cause why a receiver of the property and its rents, issues and profits, should not be appointed.

On August 17, 1904, and always, the Sheep Company was, and had been, in the actual and exclusive possession and control of the lands and all crops thereon. On that day the appellant, Strain, was aware of the fact that a foreclosure suit had been commenced, but had neither knowledge nor notice of the restraining order or order to show cause made in April. While the Sheep Company, mortgagor, was so in the actual and exclusive possession and control of all the property, both real and personal. and on August 17, there was on the land a large amount of hay and oats, all of which had ceased to derive nutri-

ment from the soil, were ripe, mature, and ready for the harvest, and part had been cut down. These crops were then, on August 17, sold by the Company to Strain, a bona fide purchaser, in payment and satisfaction of the debt then owing and due by the Sheep Company to him, which debt was past due and wholly unpaid, and the payment thereof had not been secured either in whole or in part by any mortgage, lien or pledge. Strain took immediate possession of the hay and oats, and remained in the actual and exclusiae possession thereof until September 4, when the receiver, Palmer, who had been appointed the day before, took the possession of them from Strain, and refused to surrender such possession (Rec. 64). On February 4, 1905, a decree of foreclosure was entered, directing that the lands be sold, and thereafter and thereunder the lands were sold for $39,311.48, which was the full amount due, including all interest, costs, attorneys' fees and expenses, which sale was confirmed and the proper receipt taken for the purchase price (Rec. 40, 56, 58). Before that time, and on October 24, 1904, Strain had filed his petition pro interesse suo (Rec. 41, 51), and an agreed statement of facts was presented (Rec 59). In addition to the foregoing matters, the agreed statement of facts showed, among other things, that Strain was without any notice of any assertion by the mortgagor or trustee of any lien upon the crops (Rec. 63). On February 26, 1906, nearly a year after the sale under the decree of foreclosure, Strain's petition pro interesse suo was denied (Rec. 66), but the proceeding was not dis-

missed at that time. To the receiver's report of April 21, 1906, (Rec. 67), Strain interposed objections upon the ground that complainants, having purchased the real property for the full amount of the debt and all costs, the mortgage was satisfied, and there could be no possible occasion for recourse to Strain's hay and oats (Rec. 72-3). The objections were overruled, and the report approved on May 28. On May 31 the order last mentioned was amended nunc pro tunc as of that date, by adding a denial of the patition pro interesse suo and a decree finally dismissing the proceeding by way of the petition (Rec. 74, 76). From the order and decree of May 28, as so amended on May 31, this appeal has been taken (Rec. 76, 78, 79, 85, 87).

The proceeding by way of petition pro interesse suo was a proper remedy. Gregory v. Pike, 67 Fed. Rep. 837, 846; Wheeler v. Walton, 64 Fed. Rep. 664-667, 15 C. C. A. 33; Krippendorf v. Hyde, 110 U. S. 276, 287; Gumbel v. Pitkin, 124 U. S. 131; Comer v. Felton, 10 C. C. A. 28; Marion v. Coler, 14 C. C. A. 83; Wiswall v. Sampson, 14 How, p. 65; 2 Daniell's Chancery Pl. & Pr. 5th Ed., Sections 1057, 1058; Simpkin's Suit in Equity in the Federal Courts, 329.

1. Appellant's first contention is that, in Montana, crops, whether fructus naturales or fructus industriales, and whether severed or not, are chattels personal as between the mortgagee of the land and a purchaser from

the mortgagor.

The Civil Code was adopted in February, 1895. Section 3876 of that Code is as follows:

"The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor."

This section is a literal reproduction of Section 2972 of the California Civil Code, the section borrowed having been passed April 1, 1878. It will be noted that this statute is part of Article III of Chapter 2 which has to do exclusively with mortgages of personal property. It will further be noted that Sections 3860 and 3861 of that Article provide, respectively, that any interest in personal property that is capable of being transferred may be mortgaged, and that a mortgage of personal property is void against subsequent purchasers in good faith for value unless possession be delivered and retained or the mortgage provide that the chattels may remain in possession of the mortgagor and be accompanied by an affidavit and be filed.

It should seem that the chapter declares growing crops to be chattels and subject to its provisions. If growing crops are chattels, of course matured crops are likewise chattels, at least as between a mortgagee of the land and a subsequent purchaser or mortgagee (in good faith and for value) of the crops.

And so the courts have held:

White v. Pulley, 27 Fed. Rep. 436.

Wlilis v. Moore, 59 Tex. 628.

Simpson v. Ferguson, 40 Pac. Rep. (Cal.) 104.

Simpson v. Ferguson, 112 Cal. 180, 44 Pac. Rep. 484.

Bank v. Stern, 120 Cal. 618, 52 Pac. 1006.

Modesto Bank v. Owens, 121 Cal. 123, 53 Pac. Rep. 552.

Bank v. Christie, 62 Pac. Rep. (Cal.) 400.

2. Appellant's next point is that matured crops are, irrespective of the Montana statutes, chattels, though not actually severed from the land.

Hecht v. Dettman, 56 Ia. 697, 7, N. W. 495.

Cadwell v. Alsop, 48 Kan. 571, 29 Pac. Rep. 1150.

Allen v. Elderkin, 22 N. W. Rep. (Wis.) 842.

And until the time for redemption expires, or at least until a receiver takes actual possession, the mortgagor may dispose of the crops as he pleases. He may undoubtedly do so even after suit to foreclose, and even of growing crops. A fortiori he may sell matured crops.

Cases cited in "1" supra; and Jones v. Adams, 59 Pac. Rep. (Or.) 811.

White v. Pulley, supra, is directly in point. So are Myers v. White, 1 Rawle (Pa.) 353, and Bettinger v. Baker, 29 Pa. St. 70, Everingham v. Braden (Ia.) 12 N. W. Rep. 142. and many other cases that might be cited.

Moreover, the agreed statement of facts specifically recognizes the property in controversy as "chattels." (Rec. 63-4).

3. The harsh and severe rule of notice of lis pendens,

by service upon defendant of the subpoena, has no application to suits involving such personal property as is the subject of ordinary commerce, e. g., horses, cattle, grain, and the like.

Murray v. Lylburn, 2 Johns. Ch. 441.

Warren County v. Marcy, 97 U. S. 96, 106.

Union Trust Co. v. Navigation Co., 130 U. S. 565.

In the Marcy Case the Supreme Court said (p. 105):

"It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purchase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way. This exception was suggested by Chancellor Kent, in one of the leading cases in this country, and has been confirmed by many subsequent decisions."

The Court of Appeals of New York said in Leitch v. Wells, 48 N. Y. 585, 613:

"It will be seen by an examination of the cases cited that the rule has always been considered a very hard one in its application to bona fide purchasers for value, and it has only been tolerated by learned judges from a supposed necessity. Chancellor Walworth, in Hayden v. Bucklin, said: 'This common-law rule of requiring purchasers at their peril to take notice of the pendency of suits in courts of justice for the recovery of property they are about to purchase, although it is really impossible

that they should actually know that such suits have been commenced, has always been considered a hard rule, and is by no means a favorite with the Court of Chancery.' This rule has most frequently been applied to purchasers of an interest in real estate, and very rarely, so far as I can learn from reported cases, to purchasers of personal property. As to real estate it has long since been abrogated by statute in this state, unless a lis pendens has been filed in the proper clerk's office. As to personal property, in this age and country of great enterprise and rapid circulation of such property, it is capable of working more mischief than good, and can hardly claim to be founded on necessity or public policy. By injunctions and receivers, transfers of the subject of an action can be prevented during its pendency; and since parties can be examined as witnesses, actual notice, when it exists, of the action or outstanding equities can more readily be shown than formerly. * * Indeed I do not think that it (the doctrine of lis pendens) has ever been applied, and I do not think it ought to be applied, to any of the aricles of ordinary commerce. Public policy does not require that it should be thus applied. On the contrary, its application to such propery would work great mischief and lead to great embarrassments. As I have before stated, it has generally been applied to real estate, and but rarely to any species of personal property. I have in mind but one case (there are doubtless others) where it has been applied to personal property."

The land only was mortgaged. The land is in the na-

ture of a pledge. The issues and profits of the land were not pledged or hypothecated, but belonged to the mortgagor in possession, which was left free to dispose of them as it might see fit.Even where the issues and profits can be and are expressly pledged as security, the law is that the mortgagee is not entitled to them unless and until he, or a receiver, takes actual possession. There cannot be a pledge of such property without possession.

Teal v. Walker, 111 U. S. 242, 248-251.

Freedman's Company v. Shepherd, 127 U. S. 494, 502.

Leavell v. Poore, 91 Ky. 321.

Jones v. Adams, 59 Pac. Rep. (Or.) 811.

1 Jones Mtgs., Sec. 670.

Hardin v. Hardin, 34 So. Car. 77, 27 Am. St. Rep. 793, and note

Bank v. Christie, 62 Pac. Rep. (Cal.) 400.

Civil Code of Mont., Sec. 3892.

Killebrew v. Hines, 104 N. C. 182, 17 Am. St. Rep. 672.

It will be observed that there is no mention made of crops, and certainly nothing that would put a third person on notice that such were intended. It is also specifically stated that after the trustee exercises the option to consider the whole obligation due, "the occupants shall pay rent to the trustee." (Rec. 23). This clause explains what is meant by rents and profits. Under this provision the Nelson Sheep Company was obligated to pay rent from the time the option was exercised, but it would certainly be unreasonable, and clearly unwarranted by

the express terms, to require the mortgagor to pay rent to the mortgagee for the use of the premises and at the same time surrender the crops which he cultivated and raised.

The crops could not have been mortgaged in 1901, having then no potential existence.

Bank v. Erreca, (Cal.) 47 Pac. Rep. 926.

Cole v. Kerr, (Neb.) 26 N. W. 598.

Rochester Co. v. Rasey, 142 N. Y. 571.

5. The only instrument by which the crops could have been mortgaged (if crops for 1904 could be mortgaged in 1901, which is denied by the cases cited in 4, supra), was a chattel mortgage executed and authenticated as required by Sections 3849 and 3861 of the Civil Code, which read:

"Sec. 3849. All mortgages, deeds of trust * of both real and personal property, executed by a corporation, are governed by the law relating to mortgages or deeds of trust of real property, and must be recorded in the office of the county clerk of every county where any part of said property is situated * but any mortgage, deed of trust * must be accompanied by the affidavit specified in Section 3861 of this code, * ."

"Sec. 3861. A mortgage of personal property is void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith for value, unless:

1. The possession of such property be delivered to and retained by the mortgagee; or,

2. The mortgage provide that the property may remain in the possession of the mortgagor and be accompanied by an affidavit of all the parties thereto, * *."

The mortgage now before the Court does not even purport to cover anything but land. If it should be construed as embracing crops then not planted but which might be planted and might mature years afterwards, it is apparent that the mortgage does not provide that the mortgagee may retain possession, and that the mortgage is not accompanied by the affidavit required by Section 3861. Argument upon this point seems to be unnecessary. It has been uniformly held that this statutory provision must be complied with.

6. If this Court should hold that the law of notice by lis pendens is applicable to suits respecting personal property such as hay and oats, we suggest that the rule cannot obtain in Montana for the reason that Section 634 of the Code of Civil Procedure of that state prescribes the only method whereby constructive notice of suit may be given, and that the state statute applies as a rule of property, as was held in Jones v. Smith, 40 Fed. Rep. 314 though the other cases are to the contrary. By virtue of Section 3872 of the Civil Code, and Section 1290 of the Code of Civil Procedure, the provisions of Section 634 supra, apply to suits to foreclose chattel mortgages. Broom v. Armstrong, 137 U. S. 266. If, however, the Court should decide that the matured crops were, on August 17, 1904, when purchased by Strain, or on September 4, 1904, when taken by the receiver from him, real estate,

(notwithstanding the statement of facts recognizes them as "chattels"), then we suggest and invoke as applicable to such state of facts the rule announced in Jones v. Smith, supra.

7. For aught that is shown, all the oats and hay had been severed from the land when the receiver took them on September 4, but, in view of the other points which seem to us conclusive in favor of appellant, we deem this suggestion of little moment.

The Supreme Court of the United States, in Teal v. Walker, supra, said:

"We believe that the rule is without exception that the mortgagee is not entitled to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises until he takes actual possession. * * * The American cases sustain the rule that so long as the mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the income and profits of the mortgaged estate; and, although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right, he cannot claim the rents; if he wishes to receive the rents he must take means to obtain the possession."

This doctrine applies in its full force to the case at bar. In the Teal Case the Court said that the objections against the right of the mortgagee to receive the profits were strengthened by a statute of Oregon, declaring, as does Secion 1316 of the Civil Code of Procedure of Montana: "A mortgage of real property shall not be deemed

a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." Sections 3750 and 3816 of the Civil Code are also suggestive.

8. Strain was a purchaser in good faith and for value.

Adams v. Vanderbeck, 62 Am. St. Rep. 498.

2 Pomeroy Eq. Jur. 209.

Clark v. Barnes, 72 Ia. 563, 34 N. W. Rep. 419, and a multitude of cases to the same effect.

If our contention be correct so far as the mortgagor's rights are concerned, then there could certainly be no question as to the rights of a bona fide purchaser like the petitioner.

Strain purchased without actual or constructive notice. The sale was made in satisfaction of an existing debt in excess of the value of the chattels. He waived his right to attach. Under Section 890 of the Code of Civil Procedure, providing that "in an action upon a contract, express or implied, for the direct payment of money, where the contract is not secured by any mortgage or lien upon real or personal property, or any pledge on personal property," Strain might have had the property (chattels) of the defendant Sheep Company attached. This waiver was, of itself, a sufficient present consideration for the sale. He took immediate possession, remained in the actual possession, and expended money upon the property, as owner. All the equities of the case are clearly with the petitioner and appellant.

9. If the court below be correct in its ruling against

appellant to the effect that the mortgage was a lien upon the crops, it follows that the record of the mortgage on the land was of itself notice that complainants had a lien upon the crops for every year from and including 1901. Upon that theory there can be no occasion for invoking the rule of notice by lis pendens. Such is the unsound conclusion necessarily following from the ruling of the Circuit Court.

10. Under the decree of foreclosure a sale was made of all the real property covered by the mortgage, and it was bid in for the full amount of the debt, interest, costs and all expenses. The mortgage debt was paid, and the decree satisfied without recourse to the property in controversy. The mortgagee had no right, in any event after his debt was satisfied, to meddle with appellant's property, and he should have been required to deliver it to the owner.

11. H. B. Palmer, receiver, acted only under color of his receivership, and not virtute officii. He was a trespasser from the beginning, will not be permitted to retain the amount expended by him upon the property, and he must pay interest on the value of the property at the rate of eight per cent. per annum from September 4, 1906.

It is respectfully submitted that the decree denying the petition and dismissing the proceeding pro interesse suo should be reversed, and the court below directed to grant the petition.

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